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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1265

ALLEN J. ZIMMER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Your Petitioner, Allen J. Zimmer, respectfully prays to the Honorable Court that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit to review judgment of that Court on February 11, 1975, affirming an opinion and judgment of the United States District Court for the Southern Division of the Western District of Missouri rendered on October 25, 1974. Petition for rehearing was denied on March 6, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not reported. A copy of the Order of Affirmance is attached to this petition and may be found in Appendix (A-1). The order of the District Court for the Southern Division of the Western Judicial District of Missouri affirming the conviction imposed by the Magistrate may be found in Appendix (A-3). A copy of the Order Denying Petitioner's Motion for Rehearing is attached and may be found in Appendix (A-6).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the District Court made on February 11, 1975 was filed and entered February 14, 1975. The order of the United States Court of Appeals denying rehearing en banc or for rehearing was made and entered on March 6, 1975. Mandate issued on March 7, 1975.

The decision of the United States Court of Appeals for the Eighth Circuit presents a novel question as to the interpretation of Rule 11 of Federal Rules of Criminal Procedure.

The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decisions of the Supreme Court of the United States.

The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of other Court of Appeals on the same matter.

The jurisdiction of the Supreme Court of the United States is invoked under 28 USCA 1254 (1). This petition is presented under and pursuant to the Federal Rules of Criminal Pro-

cedure and Rule 19-1 (a) and (b) of the Supreme Court of the United States.

This petition is accompanied by a copy of the opinion and judgment of the United States District Court for the Southern Division of the Western District of Missouri affirming conviction of petitioner by the United States Magistrate (A-3), copy of order of United States Court of Appeals for Eighth Circuit affirming United States District Court of Missouri (A-1) and copy of Order of United States Court of Appeals for Eighth Circuit Denying Petition for Rehearing (A-6) and certified copy of record of all proceedings in the Circuit Court of Appeals will be forwarded by the Clerk of the Circuit Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

1. Does the opinion of the United States Court of Appeals for the Eighth Circuit present novel and serious questions as to the interpretation of Rule 11 of Federal Rules of Criminal Procedure?

2. Is the decision of the United States Court of Appeals for the Eighth Circuit probably not in accord with the applicable decision of the Supreme Court of the United States?

3. Has the Court of Appeals for the Eighth Circuit rendered an opinion in conflict with the decision of other Court of Appeals on the same matter?

STATUTORY PROVISIONS INVOLVED

Rule 11 of Federal Rules of Criminal Procedure provides:

> "Rule 11, Pleas—A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The

court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. (As amended effective July 1, 1966.)"

Vernon's Annotated Missouri Statutes, Volume 15-B, Page 339, Section 304.010 provides in pertinent part: (Verbatim Text A-16)

"Every person operating a motor vehicle on the highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care."

Paragraphs 2, 3, 4, 5 and 6 make provisions for the speed limit and paragraph 7 provides that any person violating this section is guilty of a misdemeanor.

Vernon's Annotated Missouri Statutes, Volume 16, Page 201, Section 304.570 provides:

"any person who violates any of the provisions of this chapter or of sections or section 307.020 to 307.295, R.S. Mo. for which no specific punishment is provided, upon conviction thereof, shall be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500) or by imprisonment in the county jail for a term not exceeding one year, or both such fine and imprisonment." (R.S. 1939 8404. Amended by L. 1949 S.B.No. 1113; L. 1961 p. 496 1)"

STATEMENT OF THE CASE

This is an appeal from the petitioner's conviction upon his guilty plea to the offense of careless and imprudent driving in violation of 18 U.S.C. Section 13 and V.A.M.S. Section 304.010.

Petitioner was apprehended by the military police at Ft. Leonard Wood, Missouri on June 24, 1974. According to the statement of the arresting officer he stopped the petitioner, Allen J. Zimmer, at 0055 hours for swaying from side to side and smelled odor of alcohol on Zimmer's breath (A-12). Petitioner Zimmer was given a breathalyzer test and his blood alcohol count was .08% (A-14).

On July 29, 1974, Zimmer appeared with his counsel before the Assistant United States Attorney and since it was Zimmer's first offense and the breathalyzer indicated a low blood alcohol content the Assistant United States Attorney agreed to reduce the charge to careless and imprudent driving. Petitioner, his attorney and the Assistant United States Attorney appeared before the Magistrate and explained that the charge had been reduced to careless and imprudent driving. The Magistrate informed the Assistant United States Attorney to prepare an amended information. The Court reconvened after a few minutes and the amended information was given to Zimmer's counsel and his counsel told Zimmer to plead to the reduced charge as the fine would probably not exceed $50 but the Assistant United States Attorney could make no recommendations as to the amount of the fine.

The petitioner was brought before the Magistrate who informed the petitioner of what he was charged and explained to the defendant his Constitutional rights to trial by jury, confrontation of witnesses, etc. Petitioner signed waiver and he understood with what he was charged. The Magistrate then

informed petitioner that maximum possible punishment was $1000 fine or one year imprisonment, or both (Appendix D, A-9). The petitioner admitted he crossed a designated center line and further understood that the Magistrate was not bound by any recommendations.

Petitioner was fined $300 and 20 days imprisonment. The imprisonment was suspended and petitioner was placed on probation for a period of three months with the provision that the fine be paid on or before November 15, 1974. Execution was stayed for 30 days, and it was provided that, upon payment on the fine in satisfaction of the special condition of probation, the order of probation would be automatically vacated, set aside, and held for naught, and the petitioner discharged.

Notice of Appeal was filed in the United States District Court who on October 25, 1974 affirmed the conviction and sentence imposed by the Magistrate and specifically held that the Magistrate carefully and explicitly explained the maximum punishment, that there was a factual basis for the guilty plea as required by Rule 11, and that the sentence did not constitute an abuse of discretion by the Magistrate (A-3).

Timely appeal was filed in the United States Court of Appeals for the Eighth Circuit who affirmed the judgment of the District Court and held that petitioner's appeal is wholly lacking in merit on February 14, 1975 (A. 1).

Petition for rehearing and suggestion for rehearing en banc were denied on March 6, 1975 (A-6). Mandate issued March 19, 1975.

REASONS FOR GRANTING THE WRIT

I. The opinion of the United States Court of Appeals for the Eighth Circuit presents a novel question as to the interpretation of Rule 11 of Federal Rules of Criminal Procedure.

II. The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decision of the Supreme Court of the United States.

III. The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

ARGUMENT

I

The Opinion of the United States Court of Appeals for the Eighth Circuit Presents a Novel Question as to the Interpretation of Rule 11 of the Federal Rules of Criminal Procedure.

The Court of Appeals for the Eighth Circuit in affirming the judgment of the District Court improperly interpreted Rule 11 of the Federal Rule of Criminal Procedure that provides as follows:

> "Rule 11. Pleas—A defendant may plead not guilty, guilty or with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

> The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. (As amended, effective July 1, 1966.)"

The Petitioner contends that the Court of Appeals are in fact holding that a plea is voluntarily and understandingly made when the defendant is mistakenly informed by the Magistrate as to the maximum punishment and when there is insufficient factual basis to support the plea.

There can be no question that the maximum punishment under Vernon's Annotated Missouri Statutes, Section 304.010 (A-16) is prescribed by Vernon's Annotated Missouri Statutes, Section 304.570, supra, that provides for a fine of not less than $5.00 or more than $500.00 or by imprisonment in the county jail for 1 year, or both fine and imprisonment.

Although the Supreme Court of Missouri has not been required to interpret the meaning of Section 304.570, the St. Louis Court of Appeals in *State v. Ball*, 171 S.W. 2d 787 held that statutes should not be construed so as to lead to absurd results if they are susceptible to reasonable interpretation. It is manifest that Section 304.010 doesn't provide any specific punishment but does provide that its violation is a misdemeanor. Since Section 304.570 clearly states that any person who violates any of the provisions of this chapter for which no specific punishment is provided . . . shall be punished by a fine of not less than $5.00 or more than $500 or by imprisonment in the county jail for a term not exceeding one year or by both fine and imprisonment it is cogent that the maximum fine is $500 or 1 year in the county jail.

Petitioner asserts that the intent of the legislature is manifest and further states that even if the statutes could possibly be considered ambiguous any doubt should be resolved in favor of the petitioner. A reading of Sections 304.010 and 304.570 leaves little doubt that the Magistrate misinformed the petitioner as to the maximum punishment.

The petitioner cannot be expected to voluntarily and intelligently enter a plea when misinformed by the Magistrate as to the maximum punishment.

The United States Court of Appeals in *Rudolfa Ruiz v. United States* (5th Cir.) (1974), 494 F. 2d 1, held that Rule 11 mandates that defendant be told of the possibility of sentencing and the minimum and maximum penalties.

This Court in *McCarthy v. United States* (1969), 394 U.S. 459, in an attempt to ease the conflicts among the different circuits stated,

> "that the nature of the inquiry required by Rule 11 must necessarily vary from case to case and as such no general guidelines are established other than those expressed in the rule itself."

In the instant case petitioner's guilty plea cannot be considered voluntarily and with understanding when he is misinformed by the Court as to the maximum punishment (A-9). The error is further compounded when petitioner is further misinformed by his own counsel that the expected range of punishment would be one-sixth of that which he received and there is no factual basis in record to support the guilty plea.

II

The Decision of the United States Court of Appeals for the Eighth Circuit Is Probably Not in Accord With the Applicable Decision of the Supreme Court of the United States.

This Court held in *McCarthy v. United States*, supra,

> "that the nature of Rule 11 must vary from case to case and as such no general guidelines are established other than those expressed in the rule itself."

> "The rule pertinently provides that the Court shall not accept a guilty plea without first addressing the defendant personally and determining that the plea is made voluntarily . . . and the Court shall not enter judgment upon a guilty plea unless there is a factual basis for the plea."

Petitioner contends that a plea cannot be voluntarily and with understanding when the accused is misinformed by the Court as to the maximum punishment by the Court and mislead by his own counsel as to the probable range of punishment, and when the record does not support a factual basis for the plea.

A review of Vernon's Annotated Missouri Statutes, Section 304.010 (A-16), a violation of which petitioner was charged, and Section 304.570, which sets out the penalty, clearly state that the maximum punishment is $500 rather than $1000. Petitioner was improperly informed by the Magistrate when told the maximum punishment was $1000 fine (P. 2 Transcript of Proceedings).

The United States District Court and the Eighth Circuit Court of Appeals, apparently agreed with appellee's statement that:

> "However, even if the Court should find that the conclusion of the Magistrate was erroneous it does not vitiate Rule 11 procedures utilized in this case."

Reasoning that since petitioner received a lesser sentence than either that which the law permitted or that which he was informed the Court could impose, his plea of guilty will not be set aside for lack of understanding of its consequences.

If it was the mere fact that the petitioner was misinformed by the Magistrate as to the maximum penalty alone that petitioner complains he would readily abandon his cause. However, the petitioner reads Rule 11 and United States v. McCarthy, supra, to mean that the requirement of Rule 11 must vary from case

to case, and not on one single item but on all the facts and circumstances.

In the instant case not only was the petitioner misinformed by the Magistrate of the maximum punishment. The petitioner's counsel informed petitioner that the normal range of punishment for careless and imprudent driving was from $25 to $50. That there were no aggravating circumstances such as property damage or injury to persons. That petitioner was a first offender. That petitioner was fined six times the normal range. That there was no factual basis in the record to indicate that the petitioner crossed over the designated center line, aside from the petitioner's admission on page 2 of the trial court transcript in answer to the question by the Magistrate if he did weave back and forth across a designated center line.

The military police report and the sworn statement (A-12) of the military policeman (A-15) do not indicate petitioner crossed a center line. While it is true that the transcript of the proceedings does not reveal that the petitioner when asked by the Magistrate if he crossed the center lire turned to his counsel who whispered for him to plead guilty as the fine would only be $25 to $50, it is a fact, raised in defendant's memorandum trial brief and not specifically denied by the Magistrate or the Assistant United States Attorney.

There is nothing to indicate on what street petitioner was travelling or whether petitioner was travelling on a four lane highway with a separated grade, whether property of another or the life or limb of any person was endangered.

Certainly the court should have inquired relative to these important facts if courts are to strictly adhere to Rule 11 and be guided by matters of reality and not mere ritual.

In the instant case it would not have been an undue burden on the Magistrate to inquire of what street defendant was travelling, whether it was a four lane, what caused petitioner

to cross the center line, and whether any property was damaged or life endangered.

"The more meticously the rule is adhered to, the more it tends to discourage, or at least to enable the more expeditious disposition of the numerous and often frivolous attacks on the constitutional validity of guilty pleas." *McCarthy v. United States*, supra.

III

The Court of Appeals for the Eighth Circuit Has Rendered a Decision in Conflict With the Decision of Other Courts of Appeals on the Same Matter.

The Court of Appeals for the Fifth Circuit in *Rudolfa Ruiz v. United States*, supra, in attempting to follow the dictates of *United States v. McCarthy*, supra, failed to overturn a guilty plea when the defendant was not properly informed that he would be sentenced as a second offender because the record disclosed that he understood the maximum punishment awaiting him. The Court, however, did state it does not require disclosure of all information on the punishment authorized by the statute. It is only necessary that the defendant know the range of possible sentence, not the exact penalty the Court will assess. Rule 11 mandates only that the defendant be told of the possibility of sentencing under one of several provisions and the minimum and maximum penalties required by law.

Petitioner asserts that if Rule 11 mandates defendant be informed of the minimum and maximum punishment then *a fortiori* there is a more compelling duty on the Court not to misinform.

In the case of *United States v. Steele* (2nd Cir.), 413 F 2d 967 (1909), the Court of Appeals overturned a guilty plea when a defendant admitted he stole a typewriter. The defendant was represented by counsel when he entered his plea but

the Court held that the record needed more to support the guilty plea than the mere fact that the defendant stated that he stole the typewriter. The acts and intents of the particular defendant are necessarily to be inquired into, to determine if the plea is intelligently made.

Certainly both the bench and bar have equal duties and responsibilities and while it is not easy to admit error, integrity requires that if we are in error we at least should attempt to correct them. The law places many technical demands on the practitioner and Rule 11 requires meticulous and exact inquiries by members of the bench when taking guilty pleas. Matters of reality and not mere ritual should be controlling. Facts not assumptions should form the factual basis for the plea. These demands are not to protect the guilty but the innocent.

The Second Circuit Court of Appeals in *United States v. Steele*, supra, could easily have sustained the guilty plea by stating that the record revealed defendant admitted stealing a typewriter but they properly held that Rule 11 requires more of the trial Court than the mere admission that defendant stole a typewriter. Reality required ascertaining the acts and intent of the defendant to determine if the plea is intelligently made.

Wherefore, petitioner respectfully prays that Certiorari may be granted to properly interpret Rule 11 of Federal Rules of Criminal Procedure, resolve a conflict between the Eighth Circuit Court of Appeals and applicable decision of the Supreme Court of the United States and decision of the other Courts of Appeals on the same matter.

Respectfully submitted

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